Denver Law Review

Volume 20 | Issue 10 Article 4

1943

Vol. 20, no. 10: Full Issue

Dicta Editorial Board

DICTA

VOLUME 20

1943

The Denver Bar Association
The Colorado Bar Association
1943

PRINTED IN U. S. A.

THE BRADFORD-ROBINSON PRINTING CO.
DENVER, COLORADO

DICTA

Vol. XX OCTOBER, 1943 No. 10

War Production Board Compliance Procedure

BY G. DEXTER BLOUNT*

The following is an outline of the procedure prescribed and followed in the handling of cases which involve violations of the regulations and orders of the War Production Board.

CREATION OF WAR PRODUCTION BOARD AND LEGALITY OF ITS ACTS

The War Production Board was established by directive of the President of the United States, issued on January 16, 1942,[1] as one of seventeen war agencies, to assist him in the prosecution of the war. He derived his authority from statutes enacted by the Congress, among which are the First War Powers Act of December 18, 1941,[2] and the Second War Powers Act of March 27, 1942.[3] Article I of the Constitution of the United States granted the Congress power to enact these statutes.

The headquarters of the War Production Board are in Washington, D. C. Its operations are conducted there and in regional and district offices. The United States is divided into thirteen regions, one of which, the ninth region, covered Montana, Wyoming, Colorado, New Mexico and Utah until recently, when Montana was transferred to another region.

To the War Production Board was assigned the job of controlling the production, transfer and use of materials, products and facilities in such manner as to bring victory to the armed forces of the Allies in the shortest possible time. The chairman of the War Production Board was given exclusive authority to do what he deemed necessary, within statutory limitations, to accomplish the desired result. The War Production Board, with his approval, has issued, and will continue to issue, regula-

*Regional Attorney, War Production Board, Denver, Colorado.

[1]Executive Order 9024, 7 F.R. 329 (1942).

[2]55 STAT. 838 (1941). 50 U. S. C. (App.) S. 601 ff.

[3]56 STAT. 176 (1942). 50 U. S. C. (App.) S. 631 ff.

tions governing the allocation and use of materials, products and facilities, methods of obtaining priorities, assistance to procure them, and the operations of business in conformity with the programs of the War Production Board.

To facilitate the work the chairman created forty-one divisions, to each of which he assigned the supervision of the War Production Board over a designated industry, material or product. Each division has caused to be issued by the War Production Board, from time to time, orders restricting and controlling the operations of its industry, or the sale or use of the materials over which it has jurisdiction. More than six hundred regulations and orders that have been issued are now in use. They affect every kind of business, and the sale of every kind of product that is deemed essential, directly or indirectly, in the prosecution of the war.

CREATION AND OPERATIONS OF COMPLIANCE DIVISION

Any system of industrial control requiring restrictive regulations and orders must have adequate policing to protect manufacturers and merchants who cooperatively obey the law against the few who wilfully violate the regulations and orders. To perform that duty the chairman established the compliance division. Its responsibility is to investigate complaints of violations and to impose or recommend punishments if the investigations show that violations have occurred and are wilful and significant.

The regional compliance chief, with his assistants, operates the regional office, which has jurisdiction over the district offices. The work of the district offices in compliance cases is limited to making investigations and reporting on them. The regional office of the ninth region is located in Denver and district offices are located in Denver and Salt Lake City. When information is received in a district office that a person is suspected of violation of regulations or orders of the War Production Board, a district investigator is assigned to make an investigation. When the investigation is concluded the investigator makes a written detailed report which is carefully checked by the district senior investigator, the regional analyst, and the regional compliance chief, each of whom prepares a written analysis. If they conclude that there was no violation, or that the violation was insignificant or excusable, or that punishment will seriously impede the war effort, the case is closed. That is the result in about 80 per cent of the cases. In some of these cases the regional compliance chief issues a warning letter or cautions the respondent as to future operations. On the other hand, if there appears to have been a violation, and it was wilful and significant, the case is referred to the regional attorney for further handling.

When it appears during an investigation that the respondent is violating conservation order L-41[4] in doing prohibited construction work, the regional compliance chief may issue a stop order demanding the immediate discontinuance of such work. This may be supplemented by an additional stop order issued in Washington. Failure of the respondent to stop will be considered a serious violation and probably subject him to a criminal prosecution in the United States district court.

After a critical examination of the report of the investigator and the recommendations of the reviewers of the report, the regional attorney may recommend the closing of the case, or submit the case to the Department of Justice for criminal prosecution or the filing of an injunction suit to restrain further violations, or he may arrange with the respondent for a consent injunction decree or a consent suspension order.

In cases of emergency a temporary suspension order may be issued by the director of the compliance division with the approval of the office of the general counsel, and with or without notice to the person accused of violations. This will be done generally upon recommendation of the regional attorney. In such cases the respondent will be informed of the charges made against him, and a hearing of the charges will be had as soon as practicable. This procedure has the general effect of a temporary restraining order in an injunction suit.

If the regional attorney does not take any of these steps, he will prepare a charging letter or telegram for the regional compliance chief to sign and send to the respondent. The charging letter or telegram charges the respondent with having violated one or more orders or regulations by doing certain specified acts, or with having made misrepresentations of facts to the War Production Board. Upon receiving the charging letter or telegram, the respondent may ignore it, which amounts to an admission of the charges made, or he may answer the charges in writing, or he may notify the regional compliance chief that he desires a hearing before a compliance commissioner. In either event the case is submitted to the compliance commissioner for decision.

The compliance commissioner is not an employee of the War Production Board. He is carefully selected and appointed by the chairman of the War Production Board to preside at compliance hearings and to make reports and recommendations to the compliance division in Washington, and to render other incidental services when called upon to do so. The deans of the University of Colorado and the University of Denver law schools are the compliance commissioners for the ninth region.

HEARINGS BEFORE COMPLIANCE COMMISSIONERS

Under the Second War Powers Act the President is vested with unlimited authority to allocate materials and to grant priorities assist-

[4] 7 F. R. 2730, 3774 (1942).

ance in such manner as he shall deem necessary or appropriate to promote the national defense, subject only to the proviso that his decisions must be "in the public interest." This power has been delegated by the President, through statutory authorization, to the chairman of the War Production Board. It is executive in nature, may be exercised without notice or hearing, and is subject only to the limitation that it may not be used arbitrarily or capriciously. As a matter of law, allocations and priorities assistance could be withheld by the War Production Board, acting upon the report of its own investigator, and without notice to the alleged violator, or an opportunity to be heard. However, it was decided by the general counsel that the public interest requires that such drastic powers should not be exercised in any case without exhausting every attempt to ascertain the exact truth, to the extent permitted by the exigencies of the war effort. The urgency of that effort would obviously not permit the full equivalent of, and the delays incident to, the prosecution and trial of a case pending in court. The present compliance procedure was, therefore, designed to give as close an approximation of judicial proceedings as was thought advisable under the circumstances. In other words, the objective of the procedure set up is to provide the maximum degree of fairness in determining if priorities and allocations should be withdrawn, or other penalties should be imposed, consonant with the time limitations under which the War Production Board must necessarily operate.

For these reasons the hearings before the compliance commissioners are designed as opportunities for frank and open presentation of all the facts to determine whether or not punishment should be inflicted. The purpose of the proceedings is to afford the respondent an opportunity to admit the violations charged and to show that mistakes have been made by him, or to show other mitigating circumstances which might be taken into account in connection with determining what penalty, if any, should be imposed; or the respondent may deny the charges, in which event evidence will be introduced by the regional attorney for the purpose of proving them.

The hearing before the compliance commissioner is informal. Technical rules restricting the admission of evidence are disregarded. The object is to ascertain the true facts as quickly and simply as possible. The case against the respondent is made by introduction of the charging letter and, when the charge is denied, by the introduction of other evidence. The respondent is permitted to make an uninterrupted statement, usually not under oath, either with or without the assistance of questioning by his attorney. If he makes false statements or wilful misrepresentations, he may be prosecuted criminally. He may produce supporting witnesses. He may introduce as exhibits written statements or docu-

ments. Technical proof of the execution of the documents is not required. So long as his testimony is confined to the issues and is factual he will not be restricted. He may be cross-examined by the regional attorney. Evidence contradicting his evidence may be introduced. The compliance commissioner may force the production of evidence by issuing subpoenas and subpoenas duces tecum. The hearings are short. They are not open to the public. Neither news reporters nor other people not directly involved are permitted to attend the hearings. They are usually held in the office of the regional attorney. After the taking of testimony is completed, the attorney representing the respondent and the regional attorney are permitted to make arguments, but argumentative discussions are not permitted prior to that time.

After the hearing the reporter transcribes the testimony and delivers the transcript to the compliance commissioner, who studies the transcript, the regulation or order involved, and the report of the investigator; and makes such other investigation as he sees fit. He then prepares a written report, similar to a report made by a court referee. With the report he submits recommendations as to the disposition of the case.

The compliance commissioner may withold temporarily making his report and recommendations. After the hearing is concluded, he may issue a probationary order (hereinafter explained), which is a direction that no formal disposition of the case be made for a specified period of time pending a determination of the possibility of continuing violations in the future.

The compliance commissioner may also preside at investigatory hearings, upon request of the regional attorney, to discover facts regarding the operations of the business of a person that might justify the issuance of a charging letter or telegram. These hearings are held when that person refuses to disclose the facts and to show his records to an investigator of the compliance division. By the issuance of a subpoena or subpoena duces tecum, the compliance commissioner may force the attendance of witnesses and the production of documents at the hearings.

RECOMMENDATIONS AND ORDERS OF THE COMPLIANCE COMMISSIONER

The compliance commissioner delivers his report to the regional office, together with his separate recommendations, and a proposed suspension order if he decides that one should be issued. The report, recommendation and proposed suspension order are then forwarded to the compliance division in Washington for final decision. The legal department may propose a different suspension order if not more severe than the one proposed by the compliance commissioner.

If the compliance commissioner finds that there was not a wilful and significant violation, he will recommend that the case be closed, and when it is closed he notifies the respondent. If he finds that there was a wilful and significant violation and he does not issue a probationary order, or postpone punishment during good behavior, he may recommend (1) a criminal prosecution, (2) an injunction suit, or (3) a suspension order. The recommendation of the compliance commissioner is generally adopted in Washington and the punishment prescribed, if any, is ordered.

By the use of the word "wilful" it is not intended that the imposition of penalties shall be confined to violations which are accompanied by an evil intent or corrupt purpose. Conduct marked by gross negligence or careless disregard of whether or not a person has the right so to act, is "wilful," and, under such circumstances, it is no defense for him to say that he did not intend to violate the regulation or order, or that he was not familiar with its terms, if by reason of his business operations he should have known about them.

If the compliance commissioner recommends criminal prosecution or an injunction suit, the regional attorney refers the case to the Department of Justice for the filing and prosecution of the criminal or civil suit. In the event of a conviction in a criminal case, the maximum penalties are a fine of $10,000 and imprisonment for one year on each count.

If a suspension order is issued it may contain provisions which (1) withdraw or withhold priorities assistance from a respondent, (2) withdraw or withhold allocations of scarce materials or products from respondent, (3) prohibit respondent from receiving, delivering, or otherwise dealing in specified scarce materials or products, (4) limit or restrict a respondent in the manufacture or production of scarce materials or products, or (5) otherwise regulate the business of respondent to assure future compliance. The suspension order usually has the effect of an injunction decree restraining respondent from operations for a period of not less than three months. The suspension order is effective upon its issuance in Washington and service by mail upon the respondent. He may appeal to the chief compliance commissioner in Washington to have the execution of the suspension order stayed, or to have it set aside or modified. The compliance division may also appeal from the conclusions and recommendations of the compliance commissioner. The method of appeal is informal. It may be by letter, or in any other written form. It should set forth in detail the facts and reasons why the requested relief should be granted. The chief compliance commissioner may prescribe rules and forms changing the present appeals procedure. The decision of the chief compliance commissioner upon an appeal is final. No provision has been made for a court review. It is believed that no court has juris-

diction to set aside a suspension order, except possibly for the reason that it was issued maliciously or capriciously.

PROBATIONARY PROCEDURE

Recently the compliance commissioner was granted authority to issue probationary orders instead of recommending prosecutions or suspension orders. He may put the respondent upon probation for a period of months, after a hearing before the compliance commissioner has been held, if the case involves a minor violation, and, in some more substantial cases where the respondent is engaged primarily in war work.

The probationary order will not be issued unless the compliance commissioner is satisfied that there was no deliberate attempt on the part of the respondent to impede the war effort; that there was no diversion of critical materials to non-essential uses; and that there is no present danger of a continuance of the violations. As a condition to the issuance of the probationary order, in lieu of other penalty, the compliance commissioner requires the respondent to give assurances, either orally or in writing, and as a part of the record, that he will conduct his business in the future in accordance with the regulations and orders of the War Production Board. The respondent must also satisfy the commissioner that his purchase and sales records are being kept in a satisfactory manner so that they will show fully and accurately all his transactions in restricted materials, equipment and facilities.

At the end of the probationary period, or during that time, an investigator will make further investigations of the respondent's records and business activities. If the investigator finds that the respondent is operating his business and keeping his records in accordance with the regulations and orders, he will so report to the compliance commissioner, who may then close the case at the end of the probationary period, or extend the probationary period and close the case after the end of the extended period. If, as a result of the investigations, or for any other reason, the compliance commissioner is convinced that the respondent is continuing to violate the regulations and orders during the probationary period, he may recommend the issuance of a suspension order in addition to, or supplementary to, the probation order. This may be done with or without the taking of additional testimony.

DICTA

Published monthly by the Denver and Colorado Bar Associations.

20 cents a copy $1.75 a year

Address all communications concerning:

Editorial matters of the Denver Bar Association, to Dicta, George A. Trout, Editor-in-Chief, 214 State Capitol, Denver 2, Colo.

Editorial matters of the Colorado Bar Association, to Charles H. Haines, Jr., 730 Equitable Bldg., Denver 2, Colo.

Advertising, to Dicta, Sydney H. Grossman, Business Manager, 617 Symes Bldg., Denver 2, Colo.

Subscriptions, to Dicta, Fred E. Neef, Secretary, Denver Bar Association, 902 Midland Savings Bldg., Denver 2, Colo.

HONOR ROLL

Members of the Denver Bar Association Who Have Lost Their Lives in the Service of the United Nations

Alvin Rosenbaum, First Lieutenant, United States Army Air Forces, August 2, 1943.

"Arch" White, for many years deputy clerk and clerk of the Supreme Court of Colorado, has contributed some of the anecdotes and stories gathered by him through his long associations with courts and lawyers. Mr. White is now playing the part of a gentleman of leisure in the warmer surroundings of Phoenix, Arizona.

We hardly believe these exhaust his fund of recollections, and hope that he will find it possible to give additional light to our sometimes gray and somber pages.

Are Lawyers Performing Services Essential to the Community or for the War Effort? †

BY CHRISTOPHER B. GARNETT*

It is recognized that there is a tendency among some thoughtless people to join Jack Cade in the claim that lawyers do not have a place in society and that the profession of law should be abolished. "Nay, first let's kill all of the lawyers." It is also well known that in the totalitarian states, since there is no such thing as the liberty of the individual, the need for a lawyer does not exist. But in this country, as long as we maintain the rights which are guaranteed by Magna Charta and the Bill of Rights, as long as the ancient high prerogative writ of *habeas corpus* exists to enable the individual to obtain relief from illegal confinement and to liberate one who has been imprisoned without sufficient cause, as long as we recognize the four freedoms as essential to the well-being of society, just so long will there be need for the profession of law. When, therefore, a department of our government, either expressly or by inference, affirms that the profession of law does not conduce to the well-being of society and is not essential to the winning of the war, it becomes the duty of every patriot to examine the philosophies underlying such instrumentalities in order to determine whether the totalitarian theory is not beginning to permeate our legal structure.

In one OPA rationing order,[1] relating to mileage rationing for gasoline, the former director has prescribed what persons are entitled to preferred mileage in the use of automobiles for passenger purposes, and has enumerated twenty classes of society to whom the privilege is granted. These classes include:

(1) Officers or agents of the federal, state, local or foreign governments;

(2) School teachers and officials and persons transporting pupils or teachers;

(3) Mail carriers;

(4) Carriers of newspapers or news reels; and

(5) Physicians (including dentists, osteopaths and chiropractors and midwives);

---

†Submitted to Hon. Prentiss M. Brown, Administrator of the Office of Price Administration, February 19, 1943. Reprinted by permission from the March, 1943, Mississippi Law Journal.

*Member of Virginia State, District of Columbia, and American Bar Associations; B.A., M.A., Univ. of Virginia; LL.B., Univ. of Richmond. President of Virginia State Bar Association for 1943-44.

[1]OPA Rationing Order No. 8, §1394.7706.

(6) Farm veterinarians at agricultural establishments;

(7) Nurses and medical internes;

(8) Embalmers;

(9) Practicing ministers and religious practitioners;

(10) Farmers;

(11) Transporters of farm workers, commercial fishermen, seamen or marine workers;

(12) Workers at

(a) Naval or military hospital establishments;

(b) Common carriers;

(c) Public utilities;

(d) Industrial, extractive or agricultural establishments, essential to war effort;

(13) Authorized agents of governments or of management or labor engaged in transportation for the purpose of maintaining peaceful industrial relations, or to recruit workers;

(14) Engineers, architects and technicians;

(15) Members of the armed forces of the United States or state military forces;

(16) Persons engaged in messenger service or in the delivery of telegrams;

(17) Persons engaged in scrap business.

No attempt has been made to insert here the limitations or restrictions upon the different classes, but it is evident that persons who are granted special privileges are considered as "performing services essential to the community or to the war effort."

These regulations and those first issued have been studied for the purpose of seeing whether the philosophy which lies at the basis of the divisions of society entitled to preferred mileage provided any category which would include a lawyer; but this search has been in vain. As indicated above, the privileged categories include the other learned professions of medicine and religion; they include engineers, architects and technicians, embalmers and midwives, but there is no category which can be construed as including lawyers. It would seem that the Office of Price Administration looks upon a lawyer as a wart on the nose of society which ought to be cut off.

An examination of the classification would seem to indicate that the categories therein included are considered essential to the welfare of the community or to the war effort. This phrase is used as a limitation in defining some of the classes entitled to preferred mileage; and, from the enumeration of those who are excluded from the privilege of preferred

mileage as well as by ascertaining those who are omitted from the privilege, it is evident that the services of those excluded and of those omitted are not considered essential to the community or to the war effort. For instance, it is specifically provided that preferred mileage may not be allowed to any person while engaged in promotional, merchandizing or sales activities or wholesale or retail delivery, or to any person for the repair, maintenance, installation or construction of decorations or decorative equipment, or of novelty, amusement or entertainment devices, or of portable household equipment or furniture, or for landscaping. In the same, or excluded categories, the OPA has put salesmen, both retail and wholesale, as a class who are not essential to the community or the war effort.[2]

Just why a veterinarian is entitled to preferred mileage when his services are given at an agricultural establishment, but not while he is engaged in private practice, does not seem clear.

The first draft of these regulations provided that *public* school teachers and *public* school officials were entitled to preferred mileage, but by inference excluded the teachers and officers in private and parochial schools. Very wisely this unwarranted distinction has been abolished and the revised regulations have given preferred mileage to *all* school teachers and *all* school officials, but *only when they travel to more than one recognized educational institution.*

Just why a minister is entitled to preferred mileage to enable him to meet the religious needs of the locality which he serves, but not to go from his home to his place of worship, may be explained by some quirk of the brain of the person drafting the rule, but it does not have any rational explanation to the ordinary mind.

Why is it that a lawyer's duties and functions are classified by the Office of Price Administration as not essential to the community or to the war effort, while the functions of a minister, or of a physician including osteopaths, chiropractors and midwives stand in a higher category, as do the functions of an engineer or architect or technician?

It is the purpose of this paper to examine the functions and duties of a lawyer engaged in the practice of his profession, with a view, if possible, of determining whether, under the present state of society, these functions may be dispensed with, and the lawyer, as a member of one of the oldest and most honored of the learned professions, may be considered unnecessary to the well-being of society and not essential to the war effort.

In order to determine the question whether the activities and duties of lawyers conduce to the well-being of the community, and whether they are essential to the war effort, it is necessary to consider the nature

[2]OPA Rationing Order No. 8, §1394.7706, q.

of the obligations and duties of lawyers and of the activities in which they are habitually employed.

The functions of a lawyer may be divided into two classes, first, those functions which belong to him as an officer of the court, and, second, those functions outside of official duties, in which lawyers have been habitually engaged affecting the well-being of society.

Every lawyer who is admitted to the bar becomes an officer of the court, and as such is required to take an oath to support the Constitution and laws of the United States government, the constitution and laws of his state, and to honestly demean himself in the practice of law and to the best of his ability to execute his office of attorney at law.

It is evident, therefore, that the functions of a lawyer, being an officer of the court, are as broad and as far-reaching as the functions of the court itself, and the definition of his duties and obligations must be found in the whole field of the law.

It is not unusual for the ordinary man to emphasize too much the duties and obligations of lawyers relating to the preparation and trial of cases in court. This is the most spectacular part of the lawyers' duties, but one who limits his view of the duties of a lawyer to this field does not get a very comprehensive idea of his duties and obligations.

In the field of criminal law the most important part of a lawyer's work is connected with the preparation and trial of cases in court, but in the field of civil law exactly the opposite is true. To mention only a few of the divisions of the civil law the questions growing out of domestic relations, such as parent and child, guardian and ward, husband and wife, marriage and divorce; those growing out of the death of an individual, the preparation and construction of wills, the descent and devolution of property, the appointment and regulation of personal representatives of decedents and of other fiduciaries; the complex questions growing out of contracts and their breach; those growing out of torts; those arising in the complex field of taxation, often involve matters which do not require the interposition of the court for solution. The fact that there is an appeal to the court is a great motive in bringing men to fulfill their obligations under the law, but in the case of an able and conscientious lawyer, by far the greater part of his work is the solution of questions without such an appeal.

The duties and obligations of lawyers are not confined to the settlement of disputes and the trial of cases. Their duties are becoming more and more prophylactic in their nature; and, in addition to the duty of representation of clients in proceedings in court, their duties relate to advice and guidance, whereby clients may be prevented from violations of the law and may be advised how they may conform their business practice and their daily lives to the rules and regulations laid down by

administrative bodies, such as the OPA and the other numerous alphabetical organizations composing a large part of the federal government.

Historically the lawyer in the United States has never been content to limit his duties to society and his professional activities within the practice of the law as found in the courtroom and in the representation of clients. It was a lawyer who wrote the Declaration of Independence. It was another lawyer who wrote the Virginia Bill of Rights. The Constitution of the United States was the work of lawyers and largely the work of one lawyer, James Madison, who is familiarly known as the father of the Constitution. The bill for the establishment of religious freedom in Virginia was drafted by a lawyer, and it was the clarion cry of another lawyer who summoned the people of the thirteen original colonies to declare their independence of Great Britain. All that is permanent and fundamental in the Atlantic Charter and in the four freedoms is based upon the work of lawyers.

Surely with this background and history the time has not yet come in the development of the powers of government and the duties and obligations of the citizen when the lawyer may be classified as not essential to the welfare of the community nor to the present war effort.

In a primitive society lawyers are not needed. The original political and economic unit was the family under the autocratic control of the patriarch. Property was communal; the individual possessed no rights and wished none; all offenses were defined and punished *ex post facto*. As the size of the family-state increased, it became an amorphous group, still under the absolute autocracy of the oldest living male, and still a complete communism. When the size of the group became too unwieldy for effective personal tyranny, it dissolved into households, and from these at long last the individual disentangled himself, acquired a portion of the common property and an individuality of his own. Then, and not until then, did the function of the lawyer arise to make for individuals the adjustments among themselves which they could not make without assistance.

If our government is approaching the totalitarian ideal, and we are indeed reverting into a primitive communism, if the price of individual personal freedom and individual enterprise has become too high to pay, then the function of the lawyer is disappearing along with all of the other achievements of civilization.

If we have not reached that lamentable stage, if the grasping hands of the totalitarian state have not seized the body politic, then the lawyers' work of adjusting men's relations, the one to the other, and the relations of the individual to the governments, is still the most important function of human life.

It is not without significance that, among many primitive communities, the earliest lawyers were priests. A lawyer of today who understands his position in the community and wishes to preserve civilization must still conceive of himself as a priest, a priest in the temple of justice; for unless he exercises sacerdotal functions with the highest possible sense of the dignity of his calling, he will deserve the oblivion to which there appears to be some tendency to consign him. When that time comes he will, like Samson of old, pull down the temple over his head and the Philistines who have put out the eyes of the law will perish with the law.

Tax Savings in Real Estate*

Changing times bring changing law. New fields of law have opened today in which most of us never had law school training. Outstanding examples are the Law of Labor Relations and of Federal Income Tax. Lawyers untrained in these fields are tempted to leave them alone. Yet as lawyers, when the law changes, we cannot afford to remain stationary. We must accept our responsibilities. We must grow along with the law.

No discussion of the effect of the Law of Federal Income Tax upon the Law of Real Estate would be complete without first speaking briefly of the relative position of the lawyer, the accountant and the realtor in this field. Each of these three has a definite and important function to perform.

Unfortunately, many persons are disposed to leave the lawyer out of this field entirely. The impression persists that the accountant has preempted it and that the lawyer has no place in it. Nothing could be further from the truth. The vast strides which have been made in accounting in recent years have greatly increased the ability of business management to analyze the results of its plans and policies and to determine their success or failure. *But accountancy has not made management unnecessary.* Never was management more needed than today.

Accountancy can determine for management the success of its business planning, *but it cannot make the plans.* Likewise in the income tax field the accountant can determine with speed and accuracy the results of the previous tax planning of the taxpayer. But in the vastly more important field of tax planning itself the well-trained lawyer comes into his own.

To use an illustration from the world of sport—after a big football game all of us are familiar with the maze of statistics which are furnished

---

*Address by Edmund Burroughs of the Akron, Ohio, bar, delivered before the Real Estate Section Meeting of the Ohio Bar Association at Columbus, April 5, 1943. Reprinted by permission from the OHIO BAR ASSOCIATION REPORT of May 3, 1943.

us as to the results of the play. In summarized form we learn the number of yards gained by each team through rushing, end runs and forward passes, the average length of punts, the yards lost by each team through penalties—all interesting facts but now *past* history.

But do these statistics in any way dispense with the services of the coach or the strategy of the quarterback? Would Ohio State exchange Paul Brown for any number of football statisticians?

The all-important point in tax work, as in football, is not the *recording* of the results but the *obtaining* of them.

Tax planning, determining *in advance* of a transaction its exact tax implications, and mapping out a course of action which will accomplish the desired results with the least tax cost, is preeminently the field of the lawyer. Such planning *in advance* of closing a business deal is just as essential to business success as the planning of a touchdown play *in advance of its execution* is essential to the success of the football team. Registering the success or failure of either tax or football strategy *after* the event is interesting, but largely academic. It is the province of the lawyer to direct the tax planning for his client, to conceive the right move at the right time, *before* the deal is closed and tax liability fixed.

Make no mistake, the accountant is invaluable and works hand in hand with the lawyer by furnishing the figures needed to test in advance the soundness of the lawyer's advice. *Particularly in tax work we must look before we leap.* The lawyer looks through the eyes of the law and the accountant through the eyes of accountancy. They double check each other as to the tax consequences before action is taken and a deal is closed.

We have spoken of the lawyer and the accountant—now for a brief word as to the lawyer and the realtor. Establishing a correct tax base on his real estate is all-important to the taxpayer. Upon the portion of this tax base representing the building value depend the depreciation charges of the taxpayer. Inadequate building value means inadequate depreciation and spells increased taxes.

The realtor and the realtor only can meet the need for a proper determination of building value. Usually when the taxpayer buys a property there is only one purchase price. The proper division of this price between land and building is vital. For this work the lawyer must rely upon the realtor. This field of real estate appraisal for Federal Income Tax purposes is bound to grow in importance. Here again the lawyer looks through the eyes of the law and the realtor looks through the eyes of real estate experience and real estate value. The two double-check the building value for tax purposes. Their cooperation is just as essential to satisfactory results in tax matters as the cooperation between the lawyer and the accountant.

So much for the relations of the lawyer, the accountant and the realtor—and now for a discussion of the principles of tax saving as ap-

plied to real estate transactions. Basically these principles are simple. Yet in many instances their application is difficult. There is no paradox about this. Searching for the thread of legal reasoning in many tax problems is like searching for the needle in the haystack. But this is not due altogether to the complexity of the law. It is due in large measure to the complexity of the facts to which the law must be applied.

One word of caution must be given before attempting any generalizations: General principles are hard to formulate in tax matters. Tax problems particularly are full of currents and cross currents. Acceptance of profits is wise sometimes and foolish other times. When to accept them depends very largely upon the amount of other income of the taxpayer in the particular tax year. Accordingly, in stating any general principles we must appreciate that through exceptions we sometimes prove the rule.

In every tax problem two factors are bound to appear: *The law itself and the item taxed.* The taxpayer cannot change *the law* but he can control in large measure the *item taxed.* In other words, he can so arrange and plan his real estate deals and transactions as to obtain the maximum advantages which the law allows.

Real estate transactions are conducted for profit. Profit consists of two items: Sale price and cost. Market conditions control the price, but the cost factor in the form of the tax base is at least partially in the taxpayer's control.

My first advice on tax savings therefore is, watch the tax base—watch it in appraisal of estates—watch it in foreclosure sales—watch it in the normal purchase and sale of real estate by your client.

Appraisals of property in decedents estates are almost invariably low. At the time of the inventory appraisers and lawyers alike are considering estate and inheritance taxes. Many lawyers fail to see that too low an appraisal of decedent's real estate fixes an improper tax base upon the property for income tax purposes for the estate and for the heirs alike throughout future ownership. A tax base which is unreasonably low is bound to be costly for income tax purposes.

Appraising decedent's real estate at too low a figure is penny wise and pound foolish. The Federal Estates Tax exemption is $60,000. The exemption for State Inheritance Tax is $5,000 for a surviving husband or wife and $3,500 for each child, but the exemption of the estate for income tax purposes is only $500 and the income tax rates in the very lowest bracket make the rates of tax in the lower brackets for Federal Estates Tax and State Inheritance Tax look insignificant.

By way of example, I know of one case in my own home town where the attorneys for the estate resisted strenuously the attempt of the Federal Estates Tax agents to place a $250,000 valuation upon a down-

town business block of a decedent. The estate's lawyers insisted that the block was not worth more than $200,000. The Government, as is quite frequently the case, won the argument, but the higher valuation proved a blessing in disguise. In three years' time the savings on income tax caused by increased depreciation charges due to added value wiped out the entire extra amount paid for estates tax. The lawyers for the estate in this instance learned the value of the principle: Watch the tax base in appraisal of estates.

Watch the tax base also in purchasing property at foreclosure sale. Here again the tendency is to buy low, to make a two-thirds bid and to let it go at that, if there is no competition. The attorney for the mortgagee is watching for a tax deduction, to be sure, figuring that his uncollected deficiency judgment is a good bad debt deduction. But note that this deduction is good for one year only, and then note further that the low bid at the foreclosure sale has fixed the mortgagee's tax base for the entire period of his ownership.

In later years the taxpayer, confronted with a possible heavy profit on future sale, may seek to avoid the consequences of his act. He may argue with the Government that his bid at the sheriff's sale failed to register the true market value of the property at the time, but his argument will fall on deaf ears. The Internal Revenue Department will insist that the bid price determines the market value. Hence the taxpayer by his own act will have fixed too low the tax base upon his own property.

Watch the tax base again in connection with the normal purchase and sale of real estate by your client—and by this I mean the buying or selling of it in the ordinary course of a business deal. Here almost invariably only one sale price is fixed, which covers both land and buildings combined. Many a purchaser acquires his property and holds it for years without appreciating the importance to him of knowing the exact value of the buildings as distinguished from the land. He fails to realize that in his operations of the property from year to year he is entitled—if it is a business property—to deduct annual depreciation based on the fair building value. In fact in many instances unless he has competent legal advice the owner figures that if he does not take depreciation from year to year, it will not enter into the computations in determining his profit later on in the event of sale.

No situation is more regrettable than that of a property owner who sells after many years of ownership without having taken proper depreciation upon his buildings. The income tax law gives him no relief. There must be deducted to determine his adjusted tax base in figuring his profit, or added to the sale price itself if the unadjusted tax base is to be considered, the amount of depreciation "allowed or allowable" under the Federal Income Tax law. This depreciation over a period of 20 years

on a building with a 40-year life amounts to one-half the entire building value. Regardless of whether the taxpayer has charged this depreciation against his annual rents received or not, his profits on his sale will be increased by the amount of depreciation involved.

There is no reason in view of the importance of the building value why the contract for the purchase and sale of a business block for example should not provide separately the price which is paid for the land and the price which is paid for the building. To make such allocation of the value and to segregate by the terms of the contract itself the building value from the land value may prove highly valuable to purchaser and seller alike. In fact, if at the time of the purchase the building value set forth in the contract is supported by appraisal of competent real estate men, the position of the taxpayer in connection with his tax base becomes practically impregnable.

Watch not only the tax base but also the rates of depreciation. Many lawyers take satisfaction in claiming for their clients, in their annual income tax returns, higher rates of depreciation than would normally be allowed. They seem to think that if they obtain a depreciation deduction on the basis of four to five per cent on building value as against the customary two to three and one-third per cent, that they have achieved a tax victory. They fail to recognize that if such excessive depreciation is allowed they have shortened the life of their client's building and deprived him, if he continues in ownership, of the opportunity to claim deduction for many future years.

Such excessive depreciation allowance always comes home to roost. In the end, if the taxpayer sells, he pays dearly in increased profit for his apparent previous savings. If he does not sell but continues to operate the property, in all too short a time he is confronted with the fact that his depreciation is exhausted and his right to all further depreciation deductions against income gone.

Too much emphasis cannot be placed upon the importance of the tax base. It and the selling price are the Siamese twins which determine the profit in the deal. If the tax base is unreasonably low the profit is unreasonably high and the taxpayer will pay through the nose.

Watch the tax base, therefore, in estate appraisals, in sheriff's sales, and in purchases of property in the normal course. In so far as the actual facts will reasonably permit, keep the tax base high and the rates of depreciation low.

And now for a second basis principle of tax saving—one so obvious as to seem well-nigh ridiculous—be sure not to take unnecessary profits.

I think I sense immediately your feelings that this proposition goes without saying, yet it is one of those simple principles of tax law which become lost in the details and intricacies of business.

Take, for example, the purchase of real estate by a mortgagee at sheriff's sale. Let us suppose that the attorney for the mortgage holder, to obtain the highest tax base possible, advises his client to bid the full amount of the mortgage debt, interest included. What will be the result? The Supreme Court of the United States has decided this for us. When the mortgagee bids the full claim with interest he has received as income the entire interest on the loan and he must return it for income tax purposes.

Here is an excellent example of the cross-currents of legal principle involved in income tax problems. At a mortgage foreclosure sale to bid too low is error, and to bid too high is error. We must hold ourselves between the two extremes. We must maintain within reasonable limits a tax base as high as the facts will permit. We should therefore at the sale bid what the property is then worth in the market. But we must not accept unnecessary income by bidding at the sheriff's sale more than the property is worth.

Neither should we accept unnecessary income in the case of a lease. The practice of paying additional rental by way of security is well-nigh universal. But the acceptance of such rentals in advance lays the landlord wide open to additional tax.

By way of example, take the following case: A landlord is contemplating a new lease of his business block. Two prospective tenants are on the string. The bidding is high and satisfactory to the property owner. Each party offers greatly increased rent and a deposit of cash to secure the deal. Finally, a New York chain store leases the property, offering to pay by way of security if desired the full rent for the second year in advance. The landlord is about to accept the offer but decides before doing so to consult his lawyer. Now the federal cases are clear in holding that any rent so paid in advance is income to the landlord at the time of its receipt. The proposition submitted is alluring therefore, but if accepted in the form offered will result in the landlord's receiving two years' rent in the first year and none in the second year. Such a course would result in double income in the first year and in probably tripled income tax because the increased income would be taxed in higher brackets. It would further result in the second year in no income at all against which to charge repairs, taxes paid and depreciation. However, by providing in the lease for the payment to an escrow agent of a cash amount equal to the second year's rent, to be held as security and in the event of default paid by the escrow agent month by month as rent comes due under the lease, the same results in substance can be obtained for the landlord, and obtained tax free.

Another case where one may accept profits or income carelessly without knowing it is in the compromising of indebtedness. Frequently a taxpayer owning a building now worth less than the mortgage against

it presents himself to the mortgage holder, weeping crocodile tears and stating his inability to pay the mortgage debt. Finally through what he regards as excellent business manipulation he settles the indebtedness of say $50,000 by turning back to the mortgage holder the property upon which his tax base is $30,000. The transaction is closed, the tax year ended, and then about March 15th of the following year our artful taxpayer finds that he is not so wise as he thought. If in spite of his representations to the mortgage holder he is solvent (and frequently he is) he finds that he has registered by the deal an unsuspected profit or income of $20,000. To say that he is chagrined puts it mildly. But it is too late. There is no turning back. The deal has been closed. The profit has been accepted. The tax must be paid.

One rather novel example of the tax dangers lurking in a compromise is presented by a business man of my acquaintance in my own home town, who has put in years of faithful and valuable service for his corporate employer. The employer as a reward for the services performed wants to forgive him about $20,000 of indebtedness standing against him on the company's books—but the employee cannot accept forgiveness now. The income tax penalty is too high!

Regardless, therefore, of the seeming senselessness of such advice—for tax savings, I still repeat, one must guard against acceptance of unnecessary profits. The examples given merely scratch the surface. There are many other instances which could be cited in which from the tax standpoint at least "all that glitters is not gold".

So far we have determined that for tax savings we must watch our tax base and we must avoid taking unnecessary profits. *Occasions present themselves, however, when profits must be taken, and in this situation we naturally inquire what principles of tax saving may be applied. Again the basic principles involved, subject to exceptions which may alter cases, are relatively brief and simple, i. e.: If profits must be taken, spread them, defer them or split them.*

Spreading profits involves, of course, applying the principles of the installment sale. Here on the sale of the real estate the taxpayer registers his profit but by receipt of it in installments spreads it over a period of years.

It is unnecessary for me, in speaking to a group of lawyers, to spend much time in giving examples covering the general nature of installment sales of real estate. There are, however, certain pitfalls and concealed dangers in connection with the installment sale which may not be familiar to us all, and which even if familiar should be recalled to mind from time to time. These are due to the limitation placed upon installment sales generally which requires that the "initial payments" shall not exceed 30 per cent of the purchase price.

What is meant by "initial payments"? On the face of it the words appear clear enough. Even though this phrase is plural rather than singular it seems to merely provide that the cash down payment on the deal shall not exceed 30 per cent of the purchase price. But this is far from the whole story. The law and the regulations indicate that the "initial payments" are the total amount paid in cash to the seller "during the taxable year in which sale is made." Hence, if the seller accepts on April 1st 25 per cent of the purchase price in cash and later receives quarterly installments upon the remaining balance of 2 per cent each on June 1st, September 1st and December 1st of the same tax year the principles of the installment sale cannot be applied. The seller has accepted "during the taxable year" in which sale was made 31 per cent of the purchase price and has lost his right to spread his profit.

Even more interesting than the above is the further provision of the law and the regulations to the effect that if the property sold is covered by mortgage and the purchaser assumes the mortgage or takes title to the property subject to the mortgage lien, any amount by which the mortgage exceeds the tax base of the seller is a part of the "initial payments" and is to be treated like cash.

The leading authority on this point is the Burnet case, in which the Supreme Court of the United States decided that in the sale of valuable downtown property in New York City for a total sale price of over two million dollars, the amount of the mortgage remaining upon the property at the time of the sale exceeded the tax base of the seller by about $77,000. The court further held that this excess mortgage amount was to be treated as cash, that the "initial payments" exceeded the amount allowed under the regulations for an installment sale, and that the total profit on the deal, amounting to over $600,000, was registered all in the one taxable year. This was bad enough for the taxpayer at the then prevailing rate of tax. Today such an error on the part of the taxpayer or his lawyer would be well-nigh fatal.

So much for spreading the profit or income, but we have said that we may also defer it. This is done in a real estate transaction by exchanging the properties involved. Thereupon, just as in the installment sale, the profit or income does not disappear, but through exchange of properties it is not registered at the time of the deal. Instead, it is carried forward to be realized at some later date.

Take, for example, the case of an owner of a city business block with a market value of $50,000 and a tax base to him of $20,000. He wants to purchase a farm and has a particular large farm property in mind which is worth $50,000 in the present market. If the taxpayer sells his business block for cash and then buys the farm with the cash realized, he of course registers a profit of $30,000. But if the taxpayer instead of making sale exchanges his business block for the farm, no

profit is realized. The taxpayer merely transfers his tax base of $30,000 from his business block, which he has now parted with, to the farm for which it was exchanged. Profit or income for the taxpayer will not be registered until such time as he disposes of the farm property to which his previous tax base now attaches.

Many interesting illustrations of this principle arise. For example, one very intriguing situation is that of an old industrial plant held for so many years by what I will term Corporation "A" that all of the buildings and machinery are depreciated 100 per cent, leaving Corporation "A" with a tax base consisting of land value only. This particular plant is surrounded by the properties of Corporation "B", a thriving industry which has constructed its factories all around A's property and now desires to acquire from "A" the old plant in question. Corporation "A" would like to sell, but the profit to be realized from the deal, because of absence of tax base, is prohibitive. Three years ago the parties discussed this same proposal and "A" turned down the deal at that time because it said it could not pay the tax. Now, with the increased rates under the 1942 law, it will take three times the original purchase price to give to the seller "A", after payment of its income tax, the same amount net as it would have realized after taxes from the deal three years ago.

Only one solution suggests itself, which will probably be followed: The prospective purchaser "B" now offers to build for the prospective seller "A" an entirely new plant elsewhere, with entirely new equipment, and to exchange it with "A" for the old plant and the old equipment. By this procedure the seller "A" will be supplied with an entirely up-to-date plant and by reason of the exchange of like properties will register no profit. It will merely transfer its present tax base from the old plant to the new, with the peculiarity that although the plant which "A" then owns will be up-to-the-minute it can never take any depreciation on either buildings or machinery because its tax base will not permit.

But even in connection with property exchanges there are again pitfalls which should be pointed out and which as in the case of the installment sale center around the existence of a mortgage upon the property. Suppose that the property about to be exchanged is subject to such a mortgage, and suppose further that as part of the deal the party receiving the mortgaged premises assumes and agrees to pay the mortgage obligation. This simple addition to the terms of the deal destroys the ability to make a non-taxable exchange. Assumption of the mortgage constitutes additional consideration received, prevents the transaction from being a pure exchange of one property for the other and eliminates the ability to close a deal without payment of tax.

And now for a brief discussion of our third possible handling of a profit, namely, that it may be split. Of course, to secure such a splitting

of profits there must be split ownership. But even in these days of multiple taxation it is still possible to make gifts of property to the extent of $30,000 free from tax. Nothing, therefore, prevents a property owner, at some time prior to sale of his property, from transferring by gift to his wife or son or daughter an undivided interest in his property up to $30,000 in value. True, the tax base of the original taxpayer in this share of the property will be transferred to the donee, and should the property be sold both the donor and the donee will register profit which must be returned for income tax purposes. But the profit realized, although just as big as before, is split between two owners and thereby carried into lower income tax brackets.

I think it is equally clear without further comment that such splitting of property ownership will save not only in income taxes, but in estates taxes and inheritance taxes as well. Here, therefore, the old saying "in union there is strength" seems to meet its reputation.

We have now discussed the spreading, deferring and splitting of necessary profits—but our discussion of tax savings will not be complete until we have made one further point, i. e., that we should avoid, if reasonably possible, the multiple taxation incident to the corporate form of doing business. This is indeed a novel idea, which many business men will regard with dismay as rank heresy. Nevertheless, it has real merit in many cases.

It seems to me that year by year, if I may coin a phrase, our American business men both large and small have become more and more subject to what I might term for want of any other name, "Corporationitis". Many a man owning and operating a small, thriving business seems to feel that he has not attained proper standing in the business world until his business venture is incorporated. Now definite advantages do attach to the corporate form, such as freedom from personal liability and continuance of the business after death of a stockholder without dissolution, and these advantages until quite recently have outweighed tax disadvantages. But with the tremendous increase in rates of taxation and the large number of corporation taxes, the corporate form of doing business is now at a distinct tax disadvantage. The time has come when many businesses should rid themselves of this tax burden.

Particularly is this true in the case of real estate. It has been the custom in the past to buy, own, develop and operate business buildings in the corporate form and under such corporate titles as "The X Building Company," "394 Y. Street Building, Inc." or other similar names. Such operation in the past has been satisfactory and practical. It is highly questionable whether it will prove to be so in the future in the majority of cases.

Let us have a look at the situation. "The X Building Company," which we referred to above, pays ordinary corporation income taxes con-

sisting of normal tax and surtax up to 40 per cent of its earnings. This in no way considers the possibility that if the company exceeds its excess profits credit the tax on the balance of earnings thereafter is 90 per cent instead of 40 per cent. "The X Building Company" further pays franchise taxes, capital stock taxes, and in the event that it fails to declare a sufficient value for its capital stock, a declared value excess profits tax as well. Then after the profits have been reduced by payment of all of the above taxes, they are passed on to the stockholders in the form of dividends and the stockholders proceed to pay their own personal income tax upon the amount received at customary income tax rates and in addition proceed to pay, in Ohio at least, an intangible tax which constitutes 5 per cent of the amount of all dividends received. We have already mentioned at least six different types of tax arising in the case of operation under the corporate form and we must also bear in mind that corporations are subject to heavier expenses for social security in some instances than businesses otherwise conducted.

Under the circumstances the question arises and should be seriously considered in many cases as to the expediency of dissolving the corporation and returning the property to the individual owner or owners to operate either under individual ownership or as a partnership.

However, questions like these cannot be solved in any particular case without a careful analysis of all the facts. Dissolution of the company and return of the property on surrender of the corporation's stock may in many cases involve heavy profit and heavy income tax for the stockholders. This initial problem may require liquidation over a period of years in order to spread the profits in question, or may prove impossible of solution. Again, not all businesses are susceptible to operation in the partnership form or through individual ownership. Businesses of the type which require large amounts of capital drawn from absentee owners cannot be handled except through the corporate form regardless of the tax expense involved. The income tax law and regulations will not permit.

However, in many cases where the participants in the business are all actively engaged in its operation and lend their personal supervision to it, the partnership form is today logical and desirable.

Here again, however, care must be exercised that the partnership as formed is bona fide. The Income Tax Department looks with suspicion upon any so-called partnership which attempts to continue its operation unaffected by the death of the partners or which conducts its affairs under the direction of a committee, board or other group acting in a representative capacity like a corporate board of directors. Such organizations like Massachusetts trusts will almost universally be held under the Income Tax Law and the regulations to be in fact not partnerships at all

but associations taxable in the same way as corporations and at the same tax rates.

The right to limit personal liability in connection with a partnership is likewise in doubt. While some cases indicate that limited partnerships should not be classed as corporations for purposes of tax, others indicate the contrary. The prevailing tendency of the times is to tax more widely with each passing year. Partnerships providing for limited personal liability, in my opinion, will be construed in the near future (even if they are not at present) as the equivalent of corporations for tax purposes.

Despite all of the varying factors above mentioned (and we have only scratched the surface on the possible questions involved) substantial tax savings may be effected in many instances by discontinuing the corporate form of doing business wherever this is logical and practicable and continuing operations thereafter as a partnership.

Off the Record

BY A. H. WHITE*

FOREWORD

Many compilations of "Stories for All Occasions" have been published. The following, however, is in nowise competition in that field, but rather a record of some amusing incidents in my forty-two years' association with courts and lawyers. Such relations began when I was seventeen years old, since which time, except for a period of about five years, I have been a deputy clerk or clerk of some court, the last thirty-two years of such service being in the Supreme Court of Colorado.

This is not even a local record for long service, for Mr. Charles W. Bishop served as clerk of the United States district court in Denver for more than forty-six years, besides fifteen years of service in that court in another capacity.

Mr. James Perchard was clerk of Colorado's court of appeals and its supreme court for some thirty-eight years. No clerks were ever more capable, faithful and efficient, or more popular with the patrons of their offices than these gentlemen, and each served until death overtook him.

Some of these stories are quite true, though embellished somewhat; others have some truth in them, while others have no truth at all, but persist as characteristic of the persons to whom they are attached.

---

*Formerly Clerk of the Supreme Court of Colorado.

I have told many of them so often that some of my friends have insisted that I make a record of them. If they bring pleasant memories to some members of the bar, my efforts will have been fully rewarded.

No mention is made of attorneys from the Western Slope, for I did not know them so well, nor was I thrown in their company so much.

I.

Some may think "sitdown strikes" in labor disputes are something new, but such is not the case in Colorado. They were practiced away back when Hon. James B. Orman was governor. Labor troubles had become serious in the Telluride mining district, and some citizens had petitioned the governor to call out the state militia. This is something a governor always hates to do, so Governor Orman sent Lieut. Governor David Coates to investigate and report on conditions as he found them. Lieut. Governor Coates journeyed to Telluride and after surveying the situation wired Governor Orman something like this: "The miners are in the peaceful possession of the Smuggler-Union mill."

In this connection I must repeat one of Mr. L. F. Twitchell's choice stories. I think he was one of the most delightful storytellers I ever heard. He always spoke in a low, soft voice, but you could tell from the twinkle in his eye when a choice story was forthcoming.

At the time of the Telluride strike Montrose was not much of a village. There was little water for irrigation but plenty of alkali on the 'dobe flats about. Mr. Twitchell had the honor of being the "Mayor of Montrose." The striking Telluride miners, more in the spirit of frolic than anything else, I suppose, commandeered a locomotive and a few cars and started on an excursion over the little narrow gauge railroad. When they reached Montrose they turned loose and were in for having a big time and a lot of fun. The mayor at once ordered all saloons closed. Soon the town marshal came to Mayor Twitchell with wounded pride and hurt feelings, saying the visitors had insulted him by pulling his whiskers. Mayor Twitchell sympathizing with the marshal, and promising to stop such indignities at once, caused the following notice to be posted on the town hall door. "Pulling the marshal's whiskers will not be tolerated. L. F. Twitchell, Mayor."

Then the serious proposition was to get the train away from the strikers. The engineer insisted that the water was getting low in the boiler and the strikers consented to him uncoupling the engine and running it down to the water tank. Well, the engineer just kept on going. By the time they got him back they had had their party, were tired, the fun was over and they were probably glad to be hauled back to Telluride.

Mr. Twitchell delighted in telling this story on his law partner, Mr. Frank C. Goudy, the father of Justice Frank Burris Goudy of our supreme court.

In the 'eighties when Gunnison was booming many thought it destined to become the "Pittsburgh of the West." It was a wide-open mining town. A man was shot in a gambling room adjacent to a saloon. Feeling ran high at the trial. Special counsel was employed on each side, Mr. Thomas M. Patterson for the prosecution and Mr. Thomas Macon for the defendant, or it might have been the other way 'round. Mr. Goudy, as district attorney, was examining the jury. A man was called whom he knew to be a professional gambler. After the usual formal questions, Mr. Goudy asked the man what business he was in. The man replied saying he was a speculator. Mr. Goudy asked in what particular field did he speculate. The answer was that he speculated with cards. Mr. Goudy pressed his questions further until the man admitted he was a professional gambler. Instead of asking that the prospective juror be excused, Mr. Goudy continued his questioning by saying, "Isn't it a fact that you are a member of the Illinois bar and practiced law in that state before coming to Colorado?" The man replied, "Now Frank, what's the use of bringing that up against a fellow?"

II.

Mr. Charles R. Brock was a Kentuckian, possessed great art as a story teller, and this is one of his good ones.

He and Mr. L. F. Twitchell were trying a water case to the court, Judge Charles Cavender presiding. It was a most important case and those able attorneys were neither asking nor giving quarter. Mr. Twitchell cited a case which, if applicable, would about put Mr. Brock out of court. Judge Cavender, as was his habit, was leaning back in his chair at perfect ease, seemingly paying no attention to the proceedings. He sat up promptly. Mr. Brock said the citation was purely dictum and bore no relation to the subject matter of the case at bar and should not be controlling in the matter. Judge Cavender, speaking sharply, asked, "Who wrote the opinion?" Mr. Twitchell said, "Mr. Justice Bailey." Judge Cavender said, "Give me that book. Mort Bailey was too lazy to ever write dictum."

This is another of Mr. Brock's stories. It might be entitled "Ask Jim Perchard."

During President Cleveland's first term he appointed as Secretary of the Interior, Judge L. Q. L. Lamar, for whom the town of Lamar, Colorado, was named. Later, Judge Lamar was elevated to the U. S. Supreme Court.

A friend of Judge Lamar had his first case in the United States Supreme Court and asked the clerk concerning some points of practice and procedure. To be doubly sure, he later asked Judge Lamar about docketing his case. Judge Lamar's suggestions did not agree with those of the clerk. The lawyer was quite embarrassed and confessed that he had consulted the clerk, who had advised him differently. Judge Lamar said, "Do what the clerk says. He knows a damned sight more about the practice than I do."

(Concluded in November issue.)